Editor's note: Reconsideration denied by Order dated Nov. 21, 1994; appeal filed sub nom. Mary Akootchook v. United States, Civ. No. A98-0126 (D. Alaska April 22, 1998); dismissed, (claims barred by res judicata effect of two class actions) (Nov. 2, 1999); relief from judgment denied, (Feb. 1, 2000); appeal filed, No. (9th Cir. April 3, 2000)

UNITED STATES
v.
SERGIE ALEXANDEROFF

IBLA 92-262 Decided May 20, 1994

Appeal from a decision of Administrative Law Judge Ramon M. Child finding Native allotment, AA-7497, Parcel B, legislatively approved.

Reversed.

1. Alaska: Native Allotments--Alaska National Interest Lands Conservation Act: Native Allotments

   Legislative approval of Native allotment applications granted by sec. 905(a)(1) of ANILCA, 43 U.S.C. § 1634(a)(1) (1988), is subject to specific exceptions and restrictions. One of the restrictions imposed by Congress was the requirement that the applications must describe "land that was unreserved on December 13, 1968." If the land sought was not unreserved on Dec. 13, 1968, the Native allotment application must be adjudicated pursuant to the Native Allotment Act and applicable regulations.

2. Alaska: Native Allotments--Alaska National Interest Lands Conservation Act: Native Allotments--Contests and Protests: Government Contests

   Qualifying use and occupancy must be initiated when the land is open to appropriation under the Native Allotment Act. If it can be shown that qualifying use and occupancy was initiated during that period, the applicant would hold a vested right at the time of a subsequent withdrawal. If no qualifying use and occupancy was initiated prior to withdrawal, the withdrawal will attach, the applicant will gain no vested rights, and subsequent use and occupancy will not satisfy the regulatory requirement.

3. Alaska: Native Allotments--Alaska National Interest Lands Conservation Act: Native Allotments--Contests and Protests: Government Contests

Evidence of independent use is necessary to satisfy the 43 CFR 2561.0-5(a) requirement that there must be substantial actual possession and use of the land, at least potentially exclusive of others. Adult use of land is assumed to be independent, even though the use is concurrent with other members of the family. No distinction is drawn between use in the company of older family members and use in the company of children. There is no similar assumption that a minor child is exercising independent use of the land when in the company of parents or other adults responsible for the child's welfare. There must be specific proof that the minor child acted independently.

APPEARANCES: J. P. Tangen, Esq., Regional Solicitor, Office of the Regional Solicitor, U.S. Department of the Interior, Anchorage, Alaska, for the Bureau of Land Management; Mary Anne Kenworthy, Esq., Alaska Legal Services, Anchorage, Alaska, for Sergie Alexanderoff.

OPINION BY ADMINISTRATIVE JUDGE MULLEN

The Bureau of Land Management (BLM) has appealed a January 27, 1992, decision by Administrative Law Judge Ramon M. Child, finding Native allotment application AA-7497 legislatively approved for Parcel B, pursuant to section 905(a)(1) of the Alaska National Interest Lands Conservation Act (ANILCA), 43 U.S.C. § 1634(a)(1) (1988).

On April 3, 1972, Sergie Alexanderoff filed a Native allotment application, dated April 10, 1971, with BLM. In his application, Alexanderoff claimed yearly seasonal use of two parcels (identified as Parcel A and Parcel B) located on Sitkalidak Island and on Kaiugnak Bay on Kodiak Island, beginning in 1958. Only Parcel B, described as 120 acres in Tps. 35 and 36 S., R. 28 W., Seward Meridian, Kodiak Island, Alaska, is at issue in this appeal. Alexanderoff made no claim of having improvements on Parcel B.

Much of the land on Kodiak Island has been withdrawn from appropriation for many years. On February 10, 1940, Exec. Order (EO) No. 8344 withdrew lands, including those described in Parcel B, from entry for classification and in aid of legislation. 1/ By EO No. 8857, dated August 19, 1941, the lands west of a line connecting Kizhuyak and Ugak Bays, including Parcel B, were excluded from EO No. 8344 and made a part of Kodiak National Wildlife Refuge. 2/ This second order also provided that a "strip one mile in width along the shore line" would be open to most forms of entry under the public

1/ Title 3, Code of Federal Regulations Compilation 1938-1943 at 618.
2/ Title 3, Code of Federal Regulations Compilation 1938-1943 at 986.

land laws. On May 9, 1958, Public Land Order No. (PLO) 1634 was issued. This PLO redefined the Kodiak National Wildlife Refuge, revoked EO No. 8857, and once again made all lands not within the Refuge subject to EO No. 8344. The importance of this sequence of events is the fact that the land in Parcel B was open to entry between August 19, 1941, and May 8, 1958, but closed to entry at all other times.

In 1980, Congress passed ANILCA. Section 905(a)(1) of ANILCA, 43 U.S.C. § 1634(a)(1) (1988), granted legislative approval of Native allotment applications "pending before the Department of [the] Interior on or before December 18, 1971, and which describe * * * land that was unreserved on December 13, 1968." Section 905(a)(5) of ANILCA, 43 U.S.C. § 1634(a)(5) (1988), provided that applications would not be legislatively approved pursuant to section 905(a)(1), and would be adjudicated pursuant to the requirements of the Alaska Native Allotment Act of May 17, 1906, as amended, 43 U.S.C. §§ 270-1 to 270-3 (1970) 3/ "if on or before the one hundred and eightieth day following December 2, 1980," the State of Alaska filed a protest under section 905(a)(5)(B) of ANILCA.

On June 1, 1981, the State filed a protest which was withdrawn on October 16, 1981 (Exhs. G-4, G-5). On November 17, 1990, BLM filed a contest complaint against Alexanderoff's Native allotment. A hearing was held on September 11, 1991, in Old Harbor, Alaska. In his January 1992 decision, Judge Child stated:

> According to BLM's argument, almost all allotment applications on Kodiak Island were not eligible for legislative approval by reason of the 1940 EO [Executive Order]. However, a subsequent EO in 1941 excluded the land claimed by Mr. Alexanderoff from the withdrawal as it made certain lands 'subject to settlement * * * or other dispositions under any of the public land laws' (Government Brief at 4). Certainly, the withdrawal outlined by contestant is no bar to approval of the allotment. Thus, if the withdrawal is no bar to approval of the allotment, it is inconsistent with the Congressional intent that it be a bar to legislative approval.

(Decision at 3-4).

[1] BLM argues that Judge Child erred when holding that the application was legislatively approved because the land containing Alexanderoff's Parcel B was reserved by EO Nos. 8344, 8857, and PLO 1634 on December 13, 1968. 4/ A similar case, United States v. Rastopsoff, 124 IBLA 294 (1992),

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3/ Repealed effective Dec. 18, 1971, by section 18(a) of the Alaska Native Claims Settlement Act, 43 U.S.C. § 1617(a) (1988), with a savings provision for applications pending on Dec. 18, 1971.
4/ BLM also argued that the State's protest barred legislative approval pursuant to section 905(a)(1) of ANILCA (citing Stephen Northway, 96 IBLA 301 (1987) in support of that contention).

involved appeals from an Administrative Law Judge decision that an allotment was legislatively approved pursuant to section 905(a)(1) of ANILCA. Our Rastopsoff decision overturned the Judge's ruling, finding legislative approval barred because the land described in the application was reserved on December 13, 1968. Id. at 299.

The legislative approval of Native allotment applications granted by section 905(a)(1) of ANILCA, 43 U.S.C. § 1634(a)(1) (1988), is subject to specific exceptions and restrictions. One of the restrictions imposed by Congress was the requirement that the applications must describe "land that was unreserved on December 13, 1968." Alexanderoff's Parcel B was not unreserved on December 13, 1968, and his Native allotment application was not legislatively approved. 5/ There being no legislative approval, his Native allotment application must be adjudicated pursuant to the Native Allotment Act and applicable regulations.

[2] The land was open to appropriation under the Native Allotment Act between August 19, 1941, and May 8, 1958. Therefore, Alexanderoff's qualifying use and occupancy must have been initiated during that period. If it can be shown that Alexanderoff initiated qualifying use and occupancy during that period, he would hold a vested right at the time of the PLO 1634 withdrawal. If no qualifying use and occupancy was initiated prior to the May 8, 1958, withdrawal, the withdrawal attached to Parcel B, Alexanderoff gained no vested rights, and his subsequent use and occupancy does not satisfy the regulatory requirement. See Akootchook v. U.S. Department of the Interior, 747 F.2d 1316, 1320 (9th Cir. 1984), cert. denied, 471 U.S. 1116 (1985); United States v. Akootchook, 123 IBLA 6, 11 (1992).

Alexanderoff, who was born on June 23, 1945 (Tr. 86), stated in his application that he initiated use and occupancy in 1958. The field report states that his use and occupancy commenced in 1955. At the hearing BLM's field examiner, Michael Kasterin, was asked to explain the discrepancy in the commencement dates, and testified that Alexanderoff had accompanied him at the time of his May 14, 1986, the field examination, and "probably * * * I asked Sergie at one time * * * when did you start using it and he probably told me 1955 and * * * I don't swear to that but I would say that is the reason for the difference" (Tr. 24-25). At the hearing Alexanderoff testified that he began using the land in 1955, while herring fishing with his father (Tr. 87). We find that the preponderance of the evidence supports a finding that Alexanderoff first went on the land in 1955. Thus, if his use and occupancy in the period between 1955 and 1958 satisfies the requirements of the Act, he commenced use and occupancy prior to withdrawal.

[3] Evidence of independent use is necessary to satisfy the 43 CFR 2561.0-5(a) requirement that there must be substantial actual possession and use of the land, at least potentially exclusive of others. Citing United

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5/ We find no need to address our decision in Northway, supra, regarding the withdrawal of a State's protest, because just as in Rastopsoff, supra at 298, in which we reviewed the Board cases dealing with that issue, legislative approval is barred on other grounds.

States v. Akootchook, supra, BLM argues that Alexanderoff held no vested rights on May 9, 1958, because his use of the land prior to that date did not qualify as independent use. In Akootchook, we noted that when an adult uses property the use is assumed to be independent, even though the use is concurrent with other members of the family. No distinction was drawn between use in the company of older family members and use in the company of children. However, we did not extend that concept to create an assumption that a minor child was exercising independent use of the land when in the company of his or her parents or other adults responsible for their welfare. There must be specific proof that the minor child acted independently. If independent use by a minor is shown, the "regulatory requirement [43 CFR 2561.0-5(a)] of 'substantial actual possession and use of the land, at least potentially exclusive of others' can be satisfied by a minor child." Id. at 10.

Judge Child reviewed the testimony of Alexanderoff, and that given by George Inga, Sr., a lifelong resident of Old Harbor, and Ron Berntsen, Sr., who testified on Alexanderoff's behalf, and found that the "uncontroverted testimony" of these witnesses was that Alexanderoff's use of Parcel B was consistent with subsistence patterns exhibited by the Natives of Old Harbor and surrounding villages. Inga testified that he had hunted with Alexanderoff's father, but did not know the location of the land described in Alexanderoff's application, or how Alexanderoff may have used Parcel B (Tr. 108-09). Berntsen testified that he had known Alexanderoff since 1965 and that he fished with Alexanderoff at Parcel B several times in 1968 and 1970 (Tr. 124). He also testified that he had hunted ducks and gathered wood with applicant and with others (Tr. 125). Berntsen did not know when Alexanderoff began using the land, but knew that his father had taken him there (Tr. 127). Alexanderoff testified that he fished, hunted duck and deer, and picked berries on the land (Tr. 88-90, 96). We are satisfied that he has shown that he used the land for a period of 5 years, if it can be found that he had initiated independent use and occupancy prior to withdrawal.

Inga did not know the location of Parcel B or how Alexanderoff may have used it. Berntsen did not know Alexanderoff before 1965. The only evidence of Alexanderoff's use prior to withdrawal is found in his testimony. He testified that he first went to Parcel B while herring fishing with his father in 1955, and that he went there two or three times to fish (Tr. 87-88). 6/ He testified that he never went to Parcel B alone (Tr. 94). More importantly, he stated that he was 15 or 16 years old the first time he ever went to Parcel B in the company of anyone other than his father (Tr. 97-98). This would have been in 1960 or 1961, which was after the withdrawal. The evidence does not demonstrate independent use and occupancy prior to withdrawal. See Akootchook, supra at 12; United States v.

6/ There is some question regarding his actual use in 1955, as Alexanderoff testified that when he was herring fishing with his father that year he did not go ashore. See Tr. 95.

Bennett, 92 IBLA 174, 176-77 (1986). No qualifying use was initiated prior to withdrawal, the withdrawal attached on May 9, 1958, and it continued until the passage of ANILCA. See Rastopsoff, supra at 299.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, Judge Child's decision is reversed and Native allotment application AA-7497 is rejected.

R. W. Mullen
Administrative Judge

I concur:

Bruce R. Harris
Deputy Chief Administrative Judge